Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Wireless Consumers Alliance, Inc.	)	WT Docket No. 99-263
	)	
Petition For a Declaratory Ruling Concerning Preemption of State Court Awards of Monetary Relief Against Commercial Mobile Radio Service Providers	)	

To: The Commission

REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA") hereby submits its Reply Comments in the above-captioned proceeding. CTIA urges the FCC to rule that Section 332(c) does not preempt *all* state consumer protection laws; only those state actions that are tantamount to rate and entry regulation are preempted.

CTIA's opening comments observed that the Wireless Consumers Alliance ("WCA") petition for declaratory relief asked the FCC to resolve an issue far broader than the state court's ruling in the case. Supporters of the WCA petition for declaratory relief all try to lead the Commission into the same intellectual trap. They urge the FCC to decide whether Section 332(c)(3)(A) preempts all state consumer protection laws. This transparent statement of the issue, even if answered, will not advance the appellate court's understanding of the scope of Section 332(c) and whether *this* case transgresses the federal preserve created by Congress therein.

Building upon the contrived issue, WCA supporters then attempt to prejudice the Commission by manufacturing dire consequences to consumers which would flow from a

contrary ruling. Public Citizen, Inc. ("Public Citizen") argues that in the absence of such a declaration, the CMRS industry would rely on Section 332(c)(3)(A) as "*carte blanche* to lie and deceive customers."[1] Erika Landin urges the Commission to "declare that cellular phone companies are not endowed with a special status in the marketplace which shields them from consumer fraud laws. . . ."[2] Ralph Nader, the Texas Office of Public Utility Counsel ("Texas PUC") and the Ohio/Illinois Plaintiffs' Attorneys all raise the specter that preemption under Section 332(c)(3)(A) will undermine the integrity of state tort and health and safety regulation and the workings of the competitive market.[3]

Section 332(c) does not on its face invalidate state consumer protection and tort laws. WCA has recognized, however, that "Congress expressly specified that its enactment pre-empts state law" and "no state has the authority to regulate 'the rates charged'"by CMRS providers.[4] Thus, the issue here is whether WCA's invocation of the state's consumer protection laws *as applied* in WCA's lawsuit will require the state court to evaluate the reasonableness of a CMRS carrier's rates and decide the amount of any refund due.[5] If so, the state statute cannot be so applied because it will transgress into an exclusively federal domain.

The California court did not find the relevant state statutes preempted *per se* by federal law. The Judge properly held that the WCA claim for monetary relief effectively challenged a CMRS provider's rates and therefore crossed the line into the federal preserve. He ruled correctly.

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1 Public Citizen Comments at 2.

2 Erika Landin Comments at ii.

3 *See* Ralph Nader Comments; Joint Comments of Gary, Naegele & Theado, Wickens, Herzer & Panza, and Futterman & Howard, Chtd. ("Ohio/Illinois Plaintiffs' Attorneys"); Texas PUC Comments.

4 See plaintiff's opening brief in state court action at 16-17 (attached).

5 As AirTouch demonstrates, in the absence of a clearly articulated legal issue placed in a concrete factual setting, Commission action on the WCA Petition would be inconsistent with Section 1.2 of its rules and with precedent holding that questions as to the scope of Section 332 are to be answered on a case-by-case basis. *See* AirTouch Comments at 8.

The WCA suit involves, at its core, a challenge to the propriety of LA Cellular's rates. The Plaintiffs claim in the Second Amended Complaint at paragraph 33 that they "received substantially less service than that for which they contracted." Plaintiff's counsel agreed with the court during oral argument that the calculation of damages would be tied to WCA's argument that subscribers did not get "what they thought they were getting and the service was not worth as much as it was advertised to be worth."[6] In other words, WCA claims the rates charged were just too high. Moreover, the plaintiffs are seeking rate-related relief on a class-wide basis going back several years. Thus, the suit is clearly about whether a CMRS provider set rates too high given the service rendered and, if so, what refund is due. Put another way, the court found it would have to determine what the rate "should" have been in retrospect for a broad class of customers. The court thus properly held that this is an area fenced off by Section 332. Its ruling did not leave consumers or the state without recourse. Consumers are free to challenge the justness and reasonableness of CMRS rates in an FCC complaint proceeding or by commencing an action in federal district court.[7] Put simply, all Section 332 restricts is state action that involves evaluating the rate set by a CMRS carrier.

Public Citizens Litigation Group argues that because the terms used in Section 332(c) preempt any attempt by "state and local government" to "regulate" the rates set by CMRS carriers, state court action involving a challenge to a CMRS carrier's rates is not preempted. It argues that this is at most a case of implied preemption, which is disfavored under prevailing

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6 See CTIA's opening comments at 12-13, quoting the transcript.

7 *See* 47 U.S.C. §§ 201, 207 and 208. CTIA notes that Mr. Nader's citation to *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976) is inapposite. In that case, Mr. Nader was "bumped" from an overbooked Allegheny flight and brought a common law action alleging fraudulent misrepresentation arising from Allegheny's failure to apprise him of its overbooking practices and a statutory claim under the Federal Aviation Act of 1958 for failure to afford him appropriate boarding priority. 426 U.S. at 293-95. The sole question before the Court was "whether the [Civil Aeronautics] Board must be given an opportunity to determine whether respondent's alleged failure to disclose its practice of deliberately overbooking is a deceptive practice." *Id.* at 298. The case thus involves the doctrine of primary jurisdiction and did not deal with statutory preemption or rate issues.

case law. This contention misses the point. The Supremacy Clause is the source of Congress' power to preempt state law. Pursuant to this power, in Section 332(c) Congress gave the FCC exclusive regulatory responsibility over CMRS rates and entry, in the interest of promoting competition, and displaced state regulation.[8] Therefore, the court had no state law to apply to the case if it determined that WCA was effectively challenging CMRS rates.[9]

The statute sets up a federal preserve which the court could not dodge, because the court had to determine whether it had jurisdiction to grant the relief requested. The court could not avoid ruling on whether the laws the Plaintiffs sought to apply could be enforced in the manner they advocated, in light of the Supremacy Clause. The court was obligated to determine whether the remedy sought by WCA under the applicable California laws at issue conflicted with, and were trumped by, federal law when applied as the Plaintiffs asked. If so, those laws, *as applied,* were (and are) preempted. Section 332(c)(3)(A) indisputably preempts state *laws* which are used to determine the reasonableness of a CMRS provider's rates — whether or not state courts are specifically mentioned.[10]

In any event, Congress clearly intended to preempt state court authority to decide the justness and reasonableness of a CMRS provider's rates. In considering preemption, Congress' intent is the "ultimate touchstone"[11] and when

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8 U.S. Const. Art. VI, Ch. 2; *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

9 *See Petition of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7495 (1995).

10 In Section 332(c), Congress occupied the field with respect to CMRS rate and entry regulation just as it did with respect to regulation of radio transmissions in Title III. *See, e.g.,* 47 U.S.C. § 301 ("maintain the control of the United States over all the channels of radio transmission"). Thus, a CMRS carrier can no more be sued in state court, under state law, regarding its rates than a radio licensee can be sued in state court for causing interference. State courts and state law are simply displaced by the Congressional assertion of primacy.

11 *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

> Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation.[12]

Section 332(c)(3)(A) could not be framed more broadly. The relevant section begins: "*no* state or local government shall have *any authority* to regulate the entry of or the rates charged by any commercial mobile service...." Section 332(c)(3)(A) and (B) sets up a process for the FCC to preempt state regulation of the reasonableness of rates and rely on market forces[13] unless a state can demonstrate that "market conditions...fail to protect subscribers from unjust and unreasonable rates," among other things. No state (including California) has met this burden. There is no doubt that Congress intended the states to stay out of just and reasonable CMRS rate determinations.

CTIA was very much involved in the process that resulted in enactment of the 1993 Omnibus Budget Reconciliation Act, in which the relevant parts of Section 332 were made law. The enactment of this Section involved a jurisdictional and regulatory "sea change" with regard to the treatment of commercial wireless providers. Before 1993, states such as California had pervasive regulatory schemes over wireless common carriers in which the touchstone was the "just and reasonable" standard for rates.[14] At the same time, states were federally prohibited from rate-regulating private wireless carriage which was virtually indistinguishable. The legislative history indicates that Congress enacted Section 332(c)(3)(A) because it found "uniform national policy is necessary and in the public interest" in order to "promote competition for wireless services" and to avoid "state regulation [that may] be a barrier to the development of

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12 *Cippillone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (internal citations omitted).

13 Section 332(c)(1) even gave the FCC authority to prohibit CMRS carriers from filing tariffs and otherwise deregulate CMRS in reliance on market forces.

14 *See e.g.*, Cal. Pub. Util. Code § 728.

competition in this market." H.R. Rep. No. 103-213 at 48081 (1993). As the Commission has recognized, Congress amended the Communications Act in 1993 "to dramatically revise the regulation of the wireless telecommunications industry" by replacing '"traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework.'"[15] Congress also preempted state involvement with CMRS rates so that market forces would drive CMRS rates and technical innovation.[16]

Obviously, state court determinations across the country that a CMRS provider's rates are unjust and unreasonable would defeat the national objectives of Congress. It is well established that state courts cannot exercise rate-related authority denied the state by federal law. As SBC points out, in *Arkansas Louisiana Gas v. Hall*, 453 U.S. 571, 578 (1981), the Supreme Court ruled that a damage suit brought under state law "does not rescue it ... when Congress has established an exclusive form of regulation." In ruling on a breach of a federally approved contract concerning the purchase of gas, the court found that "no matter how the ruling of the Louisiana Supreme Court (granting damages) may be characterized...it amounts to nothing less than the award of a retroactive rate increase." *Id. See also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) (holding that the Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated rail carrier when the ICC has ruled on the merits of the matters raised in state court); and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) ("Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award

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15 *Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996), quoting *Second Report and Order, Implementation of Sections 3(h) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1417 (1994) (*CMRS Second Report and Order*). *See also Petition of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. at 7495 (Congress "establish[ed] a national regulatory policy...not a policy that is balkanized state-by-state").

16 *CMRS Second Report and Order,* 9 F.C.C.R. at 1421.

of damages as through some form of preventive relief."). Thus, to allow a state court to interfere in a matter fenced-off by Congress from state legislatures and PUCs would completely defeat the objective of the legislation, as this case plainly demonstrates.[17]

17 It would also frustrate the procompetitive national CMRS rate and service plans that the Commission has found benefit consumers. *See CMRS Fourth Competition Report,* FCC 99-136 at ¶¶ 16-18, 62-63 (June 24, 1999).

CONCLUSION

WCA's requested ruling that Section 332(c) does not preempt *all* state consumer protection laws is irrelevant. The sole issue before the Commission is whether a state court is prohibited by Section 332(c)(3)(A) from awarding monetary relief, whether in the form of damages, restitution or otherwise, against a CMRS provider *when doing so would require the court to evaluate, set or inquire into the reasonableness of the provider's rates.* Section 332(c)(3)(A) preempts such damage claims because such an evaluation would improperly enmesh the court in retroactive ratemaking or refunds. As the Supreme Court recently observed: "Rates ... do not exist in isolation. ... Any claim for excessive rates can be couched as a claim for inadequate services and vice versa."[18] CTIA asks the Commission to declare that the California court correctly concluded that Section 332(c)(3)(A) withdraws from the state the authority to evaluate the justness and reasonableness of LA Cellular's rates and award monetary damages based thereon.

Respectfully submitted,

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[18] *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998).